satisfaction under O. 42 r. 12 of the Rules of the High Court 1980.

I also award in favour of the plaintiffs the costs of the action to be taxed by the Senior Assistant Registrar in default of agreement between the parties.

PUBLIC FEEDMILL (M) SDN. BHD. (IN LIQUIDATION)

v.

HAI YEU HIN

HIGH COURT, KUALA LUMPUR
DATO' V.C. GEORGE J.
[CIVIL SUIT NO D3-23-2633-88]
22 FEBRUARY 1994

PRACTICE & PROCEDURE: Appeal to the Judge in Chambers - Order 56 r. 1 Rules of the High Court 1980 - Notice of hearing of appeal - Whether hearing to be fixed within five days of decision of Registrar.

PRACTICE & PROCEDURE: Appeal to the Judge in Chambers - Notice of hearing of appeal - Service - Notice issued within prescribed time but served seven months after the date fixed for hearing appeal - Whether appeal properly "brought" before the Court - Order 56 r. 1(2) Rules of the High Court 1980.

PRACTICE & PROCEDURE: Appeal - Issue and service of notice of appeal - Whether adjourment of hearing of appeal had the effect of nullifying notice and extending date of service thereof - Order 56 r. 1(3) Rules of the High Court 1980.

The plaintiff appealed to the Judge in Chambers against the decision of the Senior Assistant Registrar (SAR) in which the plaintiff's application under O. 14 Rules of the High Court 1980 (RHC) was dismissed. A preliminary objection was taken by the respondent to the effect that the appeal herein was not properly before the Court as the notice of appeal issued under O. 56 r. 1 RHC had not been served within the stipulated time. Order 56 r. 1(3) provides that unless otherwise ordered the notice of appeal must be issued within five days after the judgment order was made and served not less than two days before the day fixed for hearing the appeal.

The facts showed that the day fixed for hearing the appeal, specified as the returnable date in the notice of appeal, was 12 October 1992. What happened was that on that day the plaintiff informed the Court that service of the notice had not been effected on the respondent whereupon the matter was adjourned to 8 February 1993, on which date it was again adjourned to 8 June 1993, also because of non-service. It was not until 5 May 1993, i.e some seven months after the date fixed for hearing the appeal, that the

notice was finally served on the respondent. Before the Court, it was also argued by the plaintiff that on proper construction of O. 56 r. 1(3) RHC, for the appeal to be properly before the Court, the hearing of the appeal should have been fixed within five days of the decision of the SAR.

Held:

[1] The contention by the defendant that if the appeal was to be properly before the Court it should have been fixed for hearing within five days of the Registrar's decision, which was based on the construction given to the phrase "within five days after judgment order or decision" appearing in O.56 r.1(3) by **Mallal's Supreme Court's Practice,** 2nd Edn., para 56/1/4, is clearly without merit. Even a cursory examination of the relevant sub-rules of the Order shows that such a construction of the phrase is erroneous. The explanation for this obvious and curious error must be that it was overlooked that all those said judgments relied on in that paragraph in Mallal were based on the rules in respect of appeals from the Registrar to the Judge in Chambers obtained in the pre-1980 period in respect of which O 54 r. 21 of the old Rules of Supreme Court 1957, which had since been replaced with the present O. 56 r. 1 of the Rules of the High Court 1980, applied.

[2] It is the policy of the Rules of Procedures of the Courts that if there is to be an appeal against the decision of a Court it has to be brought within a limited and prescribed period. Order 56 r. 1 prescribes that unless otherwise ordered the notice should be caused to be issued within five days after the judgment order and the notice will have on it specified the returnable date which date is for hearing the appeal and further that service of the notice has to be effected two clear days before that specified day. In this case the requirement on time for service has not been complied with and accordingly the appeal cannot be said to have been "brought" within the meaning of O 56 r. 1(2).

[3] The two adjournments of the date of hearing the appeal has not the effect of nullifying the notice that had been issued on 13 April 1992 and per se does not have the effect of extending the date of service of the notice.

[4] It is now considered trite that an O. 14 application made after defence has been filed should not be entertained unless an acceptable explanation for the delay is given. Bearing this in mind it can clearly be seen that it is incongrous that an appeal from a refusal to grant an O.14 judgment could be proceeded with as tardily as this appeal has been prosecuted.

[Preliminary objection allowed and appeal dismissed].

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5, O. 14, O. 56 r. 1(2), (3)
Rules of the Supreme Court 1957, O. 54 r. 21
Rules of the Supreme Court 1965, O. 58 r. 1 (UK)

Other sources referred to:

Mallal's Supreme Court Practice, 2nd Edn., paragraph 56/1/4
Supreme Court Practice 1973 (the White Book) para 58/1/1

For the plaintiff - K.K. Lai; M/s T.H. Su & Co.
For the defendant - Edwin Lim; M/s K.L. Wong & Lim

JUDGMENT

V.C. George J:

In this appeal from a decision of the Senior Assistant Registrar to the Judge in Chambers, the respondent takes a preliminary objection. He contends that the appeal is not properly before the Court.

Encl. (38) is the relevant notice of appeal. It was caused to be issued pursuant to O. 56 r. 1 by the plaintiff on 13 April 1992 in respect of its intention to appeal against the decision of the Senior Assistant Registrar given on 9 April 1992 dismissing the plaintiff's O. 14 application for summary judgment.

Order 56 r. 1(2) provides that an appeal from the Registrar to the Judge in chambers shall be brought by serving on every other party in the proceedings in which the judgment order or decision was given or made a notice in Form 114 to attend before the Judge on a day specified in the notice. The day specified in the instant notice for the parties to attend before the Judge was 12 October 1992. That was the returnable date of the notice for hearing the appeal. Order 56 r. 1(3) provides that unless the Court otherwise orders the notice must be issued within 5 days after the judgment order or decision appealed against was given or made and served not less than 2 days before the day fixed for hearing the appeal.

In the instant case when the appeal was called on 12 October 1992 for hearing Counsel for the plaintiff appellant reported that the notice had not been served and he had the matter adjourned to 8 February 1993 on which date it was again, because of non-service, adjourned to 8 June 1993. It was only on 5 May 1993 that the notice was served on the respondent.

The said 13 April 1992 being the 5th day after the said 9 April 1993, the notice was issued as required by the first limb of O. 56 r. 1(3), within the prescribed 5 days after the judgment. However, as has been seen, it was not served not less than 2 days before the returnable date for hearing, 12 October 1992. It was submitted that it follows that the appeal was not properly before the Court.

In support of his preliminary objection Counsel for defendant respondent also sought to rely on paragraph 56/1/4 of **Mallal's Supreme Court Practice,** 2nd Edn. which is a commentary on the Rules of High Court 1980 to submit that if the appeal was to be properly before the Court it should have been fixed for hearing within 5 days of the Registrar's decision. This paragraph in Mallal purports to construe the effect of the phrase in 0. 56 r. 1(3) "within 5 days after the judgment order or decision" as follows:

> "Within 5 days after the judgment, order or decision": This rule provides that in an appeal from a Registrar to a Judge in chambers not only must the notice be taken out within 5 days from the Registrar's decision but it must be made returnable for hearing before the Judge within this period.

The learned author of Mallal's 2nd Edn. cites two English authorities from the reports [1878-79] 4 QBD 205 and [1878-79] 4 CPD 203 respectively and a 1959 and two 1978 Malaysian cases in support of the above construction of the phrase.

With respect I have to point out that even a cursory examination of the sub-rules of O. 56 r. 1 shows that such a construction of the phrase in the context of 0. 56 r. 1(3) from which it is taken is clearly erroneous. The explanation for this obvious and (because it is obvious) curious error must be that it was overlooked that all those said judgments relied on in that paragraph in Mallal were based on the rules in respect of appeals from the Registrar to the Judge in chambers that were obtained in the pre-1980 period. In Malaysia we had the old Rules of Supreme Court 1957, O. 54 r. 21 which provided that:

> 21. Any person affected by an order or decision of a Registrar may appeal therefrom to a Judge at chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a Judge or Registrar ...

The 5 days within which the appellant must ensure that the notice of appeal is made returnable for hearing was obviously an unrealistic rule and an amendment of it was called for. In England where they had a similar rule before 1965, the amendment was made in the new Rules of Supreme Court 1965 by the doing away with the old O. 54 r. 21 and replacing it in 1965 with the new O. 58 r. 1 which we in Malaysia adopted in 1980 as our O. 56 r. 1 in our Rules of High Court 1980. In the **Supreme Court Practice 1973** (the White Book), on the commentary on O. 58 r. 1 the learned authors point out at para 58/1/1:

> Effect of Rule 1 - This rule is taken from the former O. 54 r. 21 but it makes a more realistic provision as to the time for the issue and service of appeal to the Judge in chambers.

Now, although the commentary at paragraph 56/1/4 of Mallal does not assist Counsel for the respondent defendant on his preliminary objection, I think for other reasons, also relied on by Counsel for the defendant, the objection is well founded.

It is the policy of the rules of procedures of the Courts that if there is to be an appeal against the decision of a Court it has to be brought within a limited and prescribed period. As has been seen, 0. 56 r. 1 prescribes that, unless otherwise ordered, the notice should be caused to be issued within 5 days after the judgment, order or decision and that the notice will have on it specified the returnable date which date is clearly for hearing the appeal.

In the instant notice of appeal what is prescribed is that the parties "attend before the Judge in Chambers on 12 October 1992 at 9.00 a.m. on the hearing of an application by the said plaintiff that the plaintiff's application for final judgment be allowed with costs". The point is emphatically brought home when one considers what would happen if the notice was duly served and the respondent is absent on the return date.

There can be no doubt that it would have been open to the Judge to proceed to hear and dispose of the appeal then and there on the basis that the respondent is absent though duly served.

Order 56 r. 1(3), as has been seen, prescribes that service of the notice has to be effected 2 clear days before that specified day. And as has been seen, this requirement was not met.

The "unless the Court otherwise order" part of O. 56 r. 1(3) does not help the appellant because that has reference to the time for the issue of the notice. Here the notice was issued, as has been seen, on 13 April 1992. There was no order in respect of the issue of the notice pursuant to O. 56 r. 1(3) or at all. The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that had been issued on 13 April and *per se* does not have the effect of extending the date of service of the notice.

One hypothetical but relevant question that was posed by Counsel was what happens if in fact the notice was not returned by the Court to the solicitor until, say, after the date specified in the notice. The answer to that is that the solicitors should invoke O. 3 r. 5 and seek a specific order of the Court to extend the time for service of the notice.

The salutariness of the need to effect service of the notice of appeal within a prescribed period is brought home by the facts of the instant case. Having caused the notice to issue on 13 April 1992, service of it was not effected until over a year later on 5 May 1993. Until the service of the notice was effected the defendant respondent was not aware of the fact that the plaintiffs had the intention of appealing. Counsel pointed out that that was why the defendant had presented for taxation its bill of costs in respect of the dismissal of the plaintiffs' application for summary judgment. For over a year the defendant had not realised that they had hanging over their heads an appeal. It is relevant to look at the policy of the rules in respect of the time for the bringing of O. 14 applications. There are a number of judgments that have laid down and it is now considered trite that an O. 14 application made after defence has been filed should not be entertained unless an acceptable explanation for the delay is given. Having those judgments in mind it can be clearly seen that it is incongruous that an appeal from a refusal to grant an O. 14 judgment could be proceeded with as tardily as this appeal has been prosecuted.

The clincher is seen in the words used in O. 56 r. 1(2) which are that the appeal shall be "**brought by serving** on every party ... a notice ... to attend before the Judge on a day specified in the notice" (emphasis provided). And, as has been seen, O. 56 r. 1(3) prescribes that the service must he effected not less than two days before the said returnable day for hearing the appeal. In the instant case the service was not effected as prescribed and accordingly the appeal cannot be said to have been "brought". On the preliminary objection the appeal is struck off with costs.